ATA MANAGEMENT CONSULTANTS SDN BHD

v.

MAKMURAN SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: S-02-362-1999]
28 AUGUST 2002

COMPANY LAW: *Separate legal entity - Veil of incorporation - Consultancy contract - Claim for services rendered - Construction of terms of contract, whether in issue*

The plaintiff and the defendant entered into an agreement ('the agreement') whereby the plaintiff was to be paid a fee upon getting a third party to invest in the defendant. After the execution of the agreement, the shareholders regularly disposed of their shares. Subsequently, disputes arose as to whether the plaintiff had become entitled to the commission that the defendant had contracted to pay. The matter then went before the High Court and the learned judge found against the plaintiff and dismissed its action. Hence, the instant appeal to the Court of Appeal.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the oral judgment of the court:

[1] The defendant company did nothing to offend the terms of the agreement. Therefore, the resolution of the dispute as between the plaintiff and the defendant did **not** rest, as was contended by counsel for both parties, upon the construction of the terms of the agreement. Certainly, the shareholders could deal as they wished with the shares that they owned. Furthermore, there was no plea taken before the learned judge that this was an appropriate case for the veil of incorporation to be lifted. (pp 54 h, 56 c-d, 57 g-h & 58 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif dan defendan telah menandatangani satu perjanjian ('perjanjian') di mana plaintif akan dibayar suatu fee jika berjaya mendapatkan pihak ketiga melabur di dalam defendan. Selepas pemeteraian perjanjian, pemegang-pemegang saham telah dengan secara teratur melupuskan saham-saham mereka. Berikutnya, timbul perselisihan berkaitan sama ada plaintif berhak kepada komisyen yang dijanjikan

oleh defendan. Perkara tersebut kemudian dibawa ke Mahkamah Tinggi dan yang arif hakim membuat keputusan yang menentang plaintif sekaligus menolak tindakan. Akibatnya, plaintif merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman lisan mahkamah:

[1] Syarikat defendan tidak membuat apa-apa yang menyanggahi perjanjian. Oleh itu, penyelesaian pertelingkahan di antara plaintif dan defendan tidak bergantung kepada pentafsiran terma-terma perjanjian seperti yang dikatakan oleh peguam kedua-dua belah pihak. Jelas bahawa pemegang-pemegang saham boleh berbuat apa yang mereka mahu dengan saham-saham yang mereka miliki. Lagipun, tiada hujah dibuat di hadapan yang arif hakim bahawa ini adalah kes yang sesuai untuk pengangkatan tabir korporat.

Case(s) referred to:
Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 1 CLJ 255; [1985] CLJ (Rep) 370 HC ***(foll)***
Adams & Ors v. Cape Industries PLC & Anor [1990] Ch 433 ***(refd)***
DHN Food Distributors Ltd v. Tower Hamlets London Borough Counsil [1976] 3 All ER 462 ***(not foll)***
Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 ***(not foll)***
Salomon v. Salomon & Co Ltd [1897] AC 22 ***(foll)***
Tunstall v. Steigmann [1962] 2 QB 593 ***(refd)***
Woolfson & Anor v. Strathclyde Regional Council [1978] SLT 159 ***(foll)***

For the appellant/plaintiff - Ronny Cham; M/s Ronny Cham & Co
For the respondent/defendant - Francis Wong; M/s Peter Lo & Co

[Appeal from High Court, Kota Kinabalu; Civil Case No: K22-04-1997]

Reported by Gan Peng Chiang

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

When argument began before us on 6 August 2002 counsel on both sides informed us that this case turns on the construction of a phrase in a document. Indeed the learned judge in the court below proceeded on that basis.

After having considered the matter very carefully, we find ourselves in disagreement with counsel before us. We find that this case has nothing to do with the construction of a document but rather has to do with the legal consequences of the document in question.

But before we state our reasons for disagreeing with the counsel, we must advert to the facts of the case before us. The facts are plain and straightforward and can be summarized in one paragraph.

By an agreement dated 1 August 1992 made between the appellant and the respondent, it was agreed that; and here we summarise; the appellant shall be paid a fee upon a third party investing in the respondent. The relevant clause giving rise to the dispute reads as follows:

> 3. Your professional fees shall be as follows:
>
> (a) An initial fee of $150,000.00 for advising, preparing and structuring of corporate package for presentation to a potential investor or joint venture partner.
>
> Payment of the $150,000.00 shall be on $5,000 per month. Any balance of payment shall be fully settled upon success. Either party could terminate in writing by giving notice of 30 days and any future monthly fees of $5,000.00 thereto payable against the initial fee of $150,000.00 would in consequence thereto be terminated.
>
> (b) Upon the success of an investor or joint venture partner investing into our Company, you will be entitled to a success fee of 3% to be based on gross investment fund. Such fee to be paid to your Company in proportion to the gross investment fund received. The investment fund may be either the acquisition of our company's shares or our company's assets. Any liabilities assumed or taken over by the investors or any set-off or contra of account with the investors will be deemed to be the investment fund received by us.
>
> We will not hold you as guarantor nor do we have any implicit guarantee from you for the success of the investment fund.
>
> (c) You will also be given an open option of buying up to 10% investment in our company after the valuation of our Company at the new market value.
>
> 4. The investor or joint venture partner maybe introduced by you or by us or by any other third party. Our Company would only be responsible for a total gross commission of 3%, wherein you would be responsible between yourself and any third party for their share of any introduction fee or commission.

The parties to this agreement are private limited companies. The importance of this element will emerge shortly. After the agreement was entered into, the shareholders regularly disposed of their shares.

Later, the issue arose as to whether cl. 3(b) had been triggered so that appellant was entitled to receive the fee which the respondent had contracted to pay. The learned judge in a well reasoned and comprehensive judgment came to the conclusion that the appellant (plaintiff in the court below) should fail. He dismissed the action. The appellant has now appealed to us. We find it, for the reasons we will give shortly, unnecessary to go into the reasoning of the learned judge. Suffice to say that we agree with his conclusion for different reasons.

The point overlooked by counsel on both sides, which they ought to have drawn to our attention, turns on an elementary principle of company law. It is called the Salomon doctrine. It finds its genesis in the singularly most important case in company law, *Salomon v. Salomon & Co Ltd* [1897] AC 22. It established the proposition that a company is a separate and distinct personality from its shareholders.

Let us apply that proposition to the facts of this case. The agreement in question, construed in whatever manner, was entered into between two private companies. What the respondent company is telling the appellant company is this, "If you can find someone to invest in me, I will pay you a commission or fee". The shareholders were never parties to the agreement. What happened after the agreement was made is that the shareholders disposed of their shares. That has nothing to do with the respondent, which is a separate legal entity.

Now at one time, Lord Denning MR took a very lenient view about the way in which the Salomon principle is to be applied. So, for example, in *D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council* [1976] 3 All ER 462, the Master of the Rolls expressed the view that the court must look at the economic reality before it. According to him a group of companies may be treated as a single unit for the purpose of general account, balance sheet and profit and loss account. They are to be treated as one concern so that the loss suffered by one of them may be suffered by all of them or more than one of them or any of them.

That approach has since perished. It suffered its demise in the case of *Woolfson and Another v. Strathclyde Regional Council* [1978] SLT 159. It is a Scottish case. We do not propose to set out quote passages from the leading speech of Lord Keith with whom the other Law Lords agreed. Suffice to say, that the judicial House of Lords doubted the correctness of the decision in *D.H.N. Food Distributors Ltd*, in particular with the judgment of the Master of the Rolls. Instead, the House of Lords adhered to the statement of the principle enunciated by Ormerod LJ in *Tunstall v. Steigmann* [1962] 2 QB 593 at pp. 601-602. Lord Keith said that the effect of that principle was that:

> any departure from a strict observance of the principles laid down in *Salomon v. Salomon & Co Ltd* [1897] AC 22 has been made to deal with special circumstances when a limited company might well be a facade concealing the true facts.

Further, the English Court of Appeal in *Adams & Others v. Cape Industries PLC & Another* [1990] Ch 433 has, in the context of private international law upon the issue of residence of a foreign company, re-affirmed the strict application of the Salomon doctrine.

Moving closer to home, we find reference to two cases to be of assistance. The first is *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109. In that case, Salleh Abas FJ, sitting as a High Court judge proposed a liberal approach to the question of lifting the veil of incorporation. However, a closer reading of his lordship's judgment shows that the liberality of his approach depends on the substance and accuracy of a passage from the former edition of Gower's in the Principles of Modern Company Law written and published before *Woolfson v. Strathclyde Regional Council* was decided. It is our view therefore that the expression of opinion by his lordship is no longer supported by current authority.

The second case we would refer to is *Abdul Aziz bin Atan & 87 Ors v. Ladang Rengo Malay Estate Sdn Bhd* [1985] 1 CLJ 255; [1985] CLJ (Rep) 370. It is a judgment of Shankar J, a judge of much learning whose judgments are entitled to great respect. We accord it that respect. This is what his lordship said:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company. Authority for this proposition should be found in any textbook on law relating to companies.

We agree with what his lordship said on that occasion.

That brings us to the present case. Since the respondent company did nothing to offend the terms of the agreement to which we have referred, no question of construction arises. It is a non-issue. The shareholders owned their shares. They could do with those shares as they wished. They did so. They sold it to a third party. That offended the agreement between the respondent and appellant not a jot. To cap it all, there was no plea taken before the learned judge that

this was an appropriate case for the veil of incorporation to be lifted. As we have said, the case was mounted entirely on the meaning of cl. 3. Had the learned judge been addressed by counsel on the point in issue, he might have been able to express his views on the Salomon doctrine and its present state in England.

For the reasons already given, which differ from those produced by the learned judge, this appeal is entirely without merit and must fail.

The appeal is dismissed with costs. The deposit will be paid out to respondent to account of taxed costs.